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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 721

CLAUDINE McFARLIN and LEONARD McFARLIN,
Petitioners,

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Respondent.*

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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RESPONDENT'S ADDITIONS TO THE STATEMENT OF THE CASE TO CORRECT OMISSIONS

Petitioners' statement of the case is supplemented by the following matter to correct omissions of fact.

On July 14, 1960 and for five or six years prior to that time, Mrs. McFarlin had been employed as a bus driver for the Tucumcari Public Schools during the school term and in the summer months she drove a

bus in connection with the summer recreation program in Tucumcari. (R. 17, 22-23) She had crossed the railroad tracks at this crossing three or four thousand times in the school bus, and on quite a number of occasions in her automobile. (R. 22-23)

On the day of the accident, when Mrs. McFarlin got out of her car some 190 feet from the tracks to get her mail, she did not look in the direction of Tucumcari, that is toward any approaching train, because she was going to get her mail and saw no reason for looking from that vantage point. (R. 22-23)

As she drove towards the tracks, the window on the driver's side was down but the window on the right, or the side facing Tucumcari and the approaching train, was up and closed. She stated that she saw no reason that day for having both windows down. She admitted that if both windows were down she might hear better. (R. 23-24)

It is clear that Mrs. McFarlin did not stop her car or look from any point after she left the mail boxes where she was able to see the train until she first stopped some fifteen feet from the crossing, although she did glance in the direction from which the train was coming. (R. 17-18, 26-27, 70-72, 140) The train as it approached had its headlight on and the bell on the engine was ringing and had been ringing the entire time since it left the yard at Tucumcari. (R. 90) At approximately 700 feet from the crossing, the engineer Jones started a sequence of whistles because the train was approaching the crossing. (R. 87) At approximately 400 feet, Engineer Jones began blowing the second sequence of crossing whistles and at about this time Brakeman Farris in-

formed Engineer Jones[1] that Mrs. McFarlin's car was nearing the crossing. (R. 87) Jones continued to blow the whistle. Mrs. McFarlin, not hearing the whistle, (R. 19) proceeded down the roadway, stopping at 15 feet from the crossing, at least momentarily, (R. 15, 65, 140) and then drove onto the crossing. She stated that she had never before proceeded past this point without first ascertaining if a train was there. (R. 28, 29)

Without assigning error, petitioners complain of certain "rebuttal evidence" which they say was omitted from the record despite their motion to supplement the record in the Court of Appeals.

To avoid misunderstanding as to the nature of this testimony, Respondent has filed as its Appendix I a transcript of this "rebuttal evidence" under the certificate of the reporter of the District Court.

RESPONSE TO PETITIONERS' REASONS FOR GRANTING THE WRIT

The Respondent will respond to Petitioners' points 1, 2 and 3 together since they involve the same question. Petitioners' point 4 urges that the decision of the Circuit Court of Appeals denied Petitioners their right to trial by jury under the Seventh Amendment to the Constitution of the United States and deprives them of their civil liberty and that the Circuit Court of Appeals so departed from established

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[1] In the case of *Sandoval* v. *Atchison, T. & S.F. Ry. Co.*, 30 N.M. 343, Defendant had proved without contradiction that warning signals were given both by whistle and bell. Plaintiff testified that they were not heard by him. The curtains on his car were in place. The Supreme Court (New Mexico) said: "Under such circumstances the evidence is that the signals were given and there is no evidence to the contrary."

practice as to require the supervision of the Supreme Court of the United States. This will not be responded to at all by this Respondent except to say the following:

4. It is established law that a complaint may be dismissed, or a judgment on the pleadings entered, or a summary judgment granted, or a directed verdict ordered, or a judgment notwithstanding verdict entered under the proper circumstances. Although the stage of the proceedings in each of the instances of judicial intervention is progressively different, nonetheless each can have the effect of depriving the party of a jury trial. The justification for this intervention in each instance is basically the same. Under the law, the party is not entitled to a trial (by jury or otherwise) because he cannot produce or has not produced facts sufficient by any fair and reasonable view which would entitle him to the relief he seeks. Consequently, this question presented by the Petitioners as to their "civil liberty" is controlled by the answer they seek in the first three questions presented by them. Taking the questions presented in reverse order:

3. We will concede Petitioners' point 3: "A Circuit Court cannot re-examine and weigh conflicting facts and substitute its findings of fact or the inference therefrom contrary to the verdict of the jury."

Here Petitioners and Respondent are in agreement. However, the Tenth Circuit Court of Appeals did not do that in this case as will be shown by Respondent's answer to question 1.

2. Petitioners present as their second question: "Whether what is 'reasonably' effective care in

stopping, looking and listening in approaching a railroad crossing is a question of fact or of law."

The question here presented is not a clear one since it must be answered: "It is either a question of fact or of law, or both, depending upon the case."

The second and third questions presented by the Petitioners appear to Respondent to be nothing more than particularized and partial restatements of the first question presented by Respondent. We will therefore direct our attention to the first question and by so doing undertake to answer all three.

1. Petitioners complain in the first question presented by them as follows: "Whether the decision of the Circuit Court of Appeals conflicts with New Mexico law as to the duty of care to be exercised by a motorist in approaching a railroad crossing, in a case where the motorist has stopped, looked and listened."

The first appeal heard by the New Mexico Supreme Court involving a railroad crossing accident was in 1921. The case was *Morehead* v. *Atchison, T. & S. F. Ry. Co.,* (1921) 27 N.M. 349, 201 P. 1048. It has been the law in this state since that time. *Sandoval* v. *Atchison, T. & S. F. Ry. Co.,* (1925) 30 N.M. 343, 233 P. 840; *Blewett* v. *Barnes,* (1957) 62 N.M. 300, 309 P. 2d 976; *Landers* v. *Atchison, T. & S. F. Ry. Co.,* (1961) 68 N.M. 130, 359 P. 2d 522; and *Landers* v. *Atchison, T. & S. F. Ry. Co.,* (1963) 73 N.M. 131, 386 P. 2d 46.

The Tenth Circuit Court of Appeals has considered railroad crossing law in New Mexico in several appeals since the rule was enunciated by the Court in the *Morehead case* (*supra*). These opinions have consistently followed the lead of the New Mexico Supreme

Court. This is as it should be. *Erie R. Co.* v. *Tompkins,* 304 U.S. 64, 82 L. Ed. 1188. They are: *Atchison, T. & S. F. Ry. Co.* v. *Spencer,* (1927) 20 F. 2d 217; *Atchison, T. & S. F. Ry. Co.* v. *Herbold,* (1948) 169 F. 2d 12; *Lester* v. *Atchison, T. & S. F. Ry. Co.,* (1960) 275 F. 2d 242, and the instant case. There can be no doubt from an examination of these cases that the law as to unguarded country crossings remains as it was announced in the *Morehead case* forty-three years ago. The Court in that case said:

> " 'The law requires of one going into so dangerous a place the vigilant exercise of his faculties of sight and hearing at such short distance therefrom as will be effectual for its protection, and if this duty is neglected, and injury results, there can be no recovery, although the injury would not have occurred but for the negligence of others. Continental Improvement Co. v. Stead, 95 U.S. 161, 24 L. Ed. 403; Railroad Co. v. Houston, 95 U.S. 697, 24 L. Ed. 542; Schofield v. Chicago, M. & St. P. R. Co., 114 U.S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; Northern Pacific R. R. Co. v. Freeman, 174 U.S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014; Chicago, etc., Ry. Co. v. Andrews, 64 C.C.A. 399, 130 Fed. 65; Shatte v. Erie R. R. Co., 59 C.C.A. 1, 121 Fed. 678; Ames v. Waterloo, etc., Co., 120 Iowa 640, 95 N.W. 161.' Chicago Great Western Ry. Co. v. Smith, 141 Fed. 930, at page 931, 73 C.C.A. 164."

> " 'The duty to look and listen requires the traveler to exercise care to select a position from which an effective observation can be made. The mere fact of looking and listening is not always a performance of the duty incumbent upon the traveler, for he must also exercise care to make the act of looking and listening reasonably effective.'—and cases cited. Elliott on Railroads, vol. 3, par. 1166."

"'The doctrine has been repeatedly stated by this court that a traveler approaching a railroad crossing must take notice of the fact that it is a place of danger, and must not only look and listen for the approach of trains before he goes upon the track, but must continue to look and listen until he has passed the point of danger. He must continue his vigilance until the danger is passed, and must look both ways up and down the track.' Choctaw, O. & G. R. Co. v. Baskins, 78 Ark. 355, 358, 93 S.W. 757, 758, and cases cited."

"'One need not be vigilant at extravagantly long range. This would be futile, and precaution might exhaust itself before peril came. Nor does the law expect incessant observation, or exact the performance of the impossible feat of looking both ways at once. But it is plain that care, in order to be effective, must cover the whole field of danger. If risk is inherent in a continuing state of things, the duty to exercise reasonable care is to the same extent a continuing obligation.' Winter v. New York & L. G. R. Co., 66 N.J. Law 677, 50 Atl. 339."

In the *Spencer case* (*supra*) in 1927, the Tenth Circuit Court of Appeals cited the *Morehead case* as authority at point 1, commencing on page 716 of the Report, stating the general duty to "Stop, Look, and Listen" in the following language:

"(1) As pertinent to the undisputed facts, the well-established rule is that one who is about to drive a motorcar or truck over a railroad track at an unguarded crossing always has the obligation upon him vigilantly to use his faculties of sight and hearing. The driver must look to see whether a train is approaching. If, for any reason, his view of the track is obstructed, his duty is to listen. If, perchance, the engine of his automobile is making any noise, or if there is

> noise or confusion due to any cause which interferes with his hearing; it is his duty to take the precaution of stopping and listening. If the track is a single one, he should be vigilant to look in both directions before attempting to cross."

In the *Sandoval case* (*supra*) the Supreme Court of New Mexico approved the *Morehead case* on page 346, at point 3:

> "(3) Plaintiff relies upon the alleged negligent maintenance of an embankment upon defendant's right of way, obscuring the view of travelers approaching the crossing. There is some evidence to the effect that at the turn, 100 feet from the crossing, there is an embankment which might obscure the view of the track, but the evidence is uncontradicted that from a point 33 feet from the crossing, all the way up to the crossing, there is nothing to obscure the view of an approaching train by any one who is willing to look. The plaintiff, in traveling this 33 feet, never looked up the track to see if there was an approaching train until he was within 10 feet of the crossing, when one of his companions called out that the train was approaching, whereupon he applied the brakes to stop his automobile, but failed to stop in time. This was gross negligence on the part of the plaintiff, and prevents a recovery. It is a worse case than Morehead v. A., T. & S. F. Ry. Co., 27 N.M. 349, 201 P. 1048, where it was held no recovery could be had."

In 1934, in the case of *Russell* v. *Davis,* 38 N.M. 533, 37 P. 2d 536, the Supreme Court of New Mexico for the first time made reference to what Petitioners have referred to as the "Pennsylvania rule". In this case, the New Mexico Supreme Court quoted from *Baltimore & Ohio RR Co.* v. *Goodman,* (1927) 275 U.S. 66,

48 S. Ct. 24, 72 L. Ed. 167, 56 A.L.R. 645, where it was said:

> "When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train not the train stop for him. In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look. It seems to us that if he relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk."

The facts in the case before the Supreme Court in the *Russell case* (*supra*) involved a pedestrian, however, and not a train. The Supreme Court of New Mexico in approving the "Pennsylvania rule" and the *Goodman case* had this to say at page 537 of the New Mexico Reports:

> "The rule in the Goodman case, supra, as applied to a man who goes upon a railroad track is sound. 'He knows that he must stop for the train not the train stop for him.' The train is tied in its course of travel to the tracks from which it does not deviate. It does not go careening all over the right of way. That is not true of the automobile. Its path is not fixed to two strands of steel. If the brakes of the car are in good order, it can stop within a reasonable distance. It can turn to the right or left at the command of the steering wheel. Railroad tracks are the exclusive course of the railroad train. In New Mexico the main highways are not exclusively reserved for motorists. The pedestrian can be seen trudging along or across the highway to his destination

> without deeming himself a trespasser. The narrow-wheeled wagons of the mountaineer drawn by pinto ponies vie with the lowly burros loaded with their burden of firewood for a place on the macadam or concrete. For all of these the motorist must and often does turn aside or stop to avoid collision."

This was the first mention of the so-called "Pennsylvania rule" in Nex Mexico. It was in 1934.

In 1948, the Tenth Circuit Court of Appeals again had an occasion to look at New Mexico railroad crossing laws in the case of *Atchison, T. & S. F. Ry. Co.* v. *Herbold,* 169 F. 2d 12. It followed the *Morehead case* (*supra*). On page 14, at points 2, 3 and 4, the Court stated:

> "(2) Under the law of New Mexico, a traveler on a highway approaching a railroad crossing is under the continuous duty to effectively look and listen and observe ordinary care for his own safety. Morehead v. Atchison, T. & S. F. Ry. Co., 27 N.M. 349, 201 P. 1048, 1049.
>
> "(3) Here, the crossing was open and unobstructed. If Herbold looked, he must have seen the approaching train and undertook to pass over the crossing ahead of it. So to do would constitute contributory negligence as a matter of law.
>
> "(4) If he approached the crossing known to him and failed to look from an effective point, he was likewise guilty of contributory negligence as a matter of law. Morehead v. Atchison, T. & S. F. Ry. Co., supra; Brim v. Atchison, T. & S. F. Ry. Co., 136 Kan. 159, 12 P. 2d 715, 717."

In 1957, the Supreme Court of New Mexico approved the *Morehead case* (*supra*) and at the same time approved the reasoning of the Supreme Court in the

Goodman case, and the application of the Pennsylvania rule. *Blewett* v. *Barnes*, 62 N.M. 300, 309 P. 2d 976. The Court held at point 2, page 304 of the New Mexico Reports:

> "(2) To summarize the evidence, he failed to stop, look and listen. Instead, he drove blindly upon the crossing, over the first, the second and even the third track, and into the path of an oncoming train on the fourth track before being stopped by it. This convicted him of contributory negligence, as a matter of law. The Baltimore & O. Ry. Co. v. Goodman, 275 U.S. 66, 48 S. Ct. 24, 72 L. Ed. 167; Morehead v. Atchison, T. & S. F. Ry. Co., 27 N.M. 349, 201 P. 1048; Sandoval v. Atchison, T. & S. F. Ry. Co., 30 N.M. 343, 233 P. 840. Even, if it could be said the evidence would support a finding that plaintiff 'listened,' negative as such testimony is, the testimony is undisputed that he did not stop, nor did he look. Ordinarily, a showing of all three factors is essential to establish due care."

In *Landers* v. *Atchison, T. & S. F. Ry. Co.*, (1961) 68 N.M. 130, the Supreme Court of New Mexico distinguished the law controlling a guarded crossing from the law controlling an unguarded country crossing. The Court nonetheless approved the rule commonly called the "Pennsylvania rule" as stated in the *Goodman case* by the United States Supreme Court as to open crossings.

Two years later, in 1963, the distinction made by the Court in the *Landers case* (*supra*) was approved by the Court on an appeal of a retrial of the same case. It is reported in 73 N.M. 131, 386 P. 2d 46. Again, it approved the *Morehead case* as ruling law at unguarded open crossings.

The *Lester case* (*supra*) decided in 1961 by the Circuit Court of Appeals, does not enter into the question involved here. It was concerned not with contributory negligence as such but with the question of whether contributory negligence could be a jury question in a case where gross, wanton, or wilful negligence was pleaded and proved. The Court held that it could not be under New Mexico law; therefore the *Morehead case* was not discussed.

Four decades ago, the New Mexico Supreme Court laid down the rule in the *Morehead case* which it has said is the "Pennsylvania rule." During the time since then it has been constant in its application of this rule to unguarded country crossings marked only with a crossbuck. The Tenth Circuit Court of Appeals has been faithful in applying the State law in such cases. There has been no conflict. There has been harmony. In the Petitioners' case, the Circuit Court cited only New Mexico cases or earlier Circuit Court cases applying New Mexico law.

That Court concluded in its opinion (Appendix B, Page 22 of Petitioners' Brief):

> "Under New Mexico law, she was required to stop her car at a point where, if she looked to the west, it would be effective, and to listen under circumstances which would permit her to hear what was audible. She could not shut the view from her eyes or the sound from her ears and be relieved of her duty."

The Circuit Court added there were no cases that would indicate a departure from the *Morehead case;* to the contrary, it was referred to as the law of the State as late as 1963 (ibid. f.n. 3).

Consequently, the body of law of the State of New Mexico is not threatened in any way by the opinion of the Circuit Court of Appeals.

Pokora v. *Wabash R. Co.*, 292 U.S. 98, 78 L.Ed. 1149, had no limiting effect on the *Morehead case*. Petitioners cannot hope to argue this. It is the prerogative of the New Mexico courts to approve the "Pennsylvania rule" as expressed in the *Goodman case*. Petitioners cite *Erie R. Co.* v. *Tompkins* (*supra*) for the proposition that State law is controlling on non-federal questions. They are right. The "Pennsylvania rule" (an expression of which is in the *Goodman case*) was adopted in the *Morehead case* (which is also an expression of that rule) and the *Morehead case* is the law in New Mexico.

Respondent submits that Petitioners are disturbed over *Goodman* because they have not fully understood the point that in crossing cases we are concerned with rules of conduct in determining due care and not due care as it is defined ordinarily.

Justice Holmes did not lay down once and for all in the *Goodman case* that a man must always approach a crossing on foot. He merely made an application or gave an example of what a reasonable man would do to make an effective use of his senses under the circumstances of that case before he drove his car into the path of a locomotive. Mrs. McFarlin in this case had the alternatives of stopping and looking from one of the other vantage point at the scene of the accident or of listening for the bell or whistle, or the sound of the train itself. One of these acts would have made the facts apparent to her. The evidence demonstrated that a careful and effective use of her senses would

have made her aware of the presence of the train and she could have avoided injury to herself.

The Petitioners mention the case of *Padilla* v. *Railroad Co.,* 16 N.M. 576, 120 P. 724. They cite this as authority for two propositions. (1) A decedent has the benefit of a presumption that he was exercising due care in the casualty connected with his death (he stopped, looked and listened), and (2) this presumption has the force of evidence. However, this case cannot be helpful to Petitioners. As to point (1), Mrs. McFarlin was not killed. Consequently, such a presumption cannot apply since she can establish what her actions were by testifying in her own behalf. As to point (2), the presumption does not have the force of evidence; it disappears when any reasonable evidence to the contrary is introduced. *Hartford Ins. Co.* v. *Horne,* 67 N.M. 440, 38 P.2d 1062. In fact, in 1959, the New Mexico Court in this case overruled *Padilla,* expressly, insofar as *Padilla* stood for the proposition that the presumption amounts to evidence. *Padilla* can afford the Petitioners no comfort as a buttress to this case.

5. Next Respondent turns to the fifth question presented by Petitioners: "Whether respondent waived right to ask for judgment notwithstanding the verdict by not moving for a directed verdict at the close of all the evidence."

The substance of this omitted testimony is incorporated in Respondent's Appendix I to this brief.

Petitioners cite no authority for their position except for the literal construction that they would have the Court place on Rule 50. Perhaps the Supreme Court will indulge counsel in remarking that a trial

court is a very different kind of place. During a trial such as this one, counsel for a litigant is trying to keep the jury's interest and compel their minds to a conclusion; and at the same time to preserve the record and keep the trial court correct in its view of the law; but despite these ends, he must try to preserve the amenities between the trial judge and himself and opposing counsel and himself to the extent that the fair representation of his client will allow and require.

Picture then the situation disclosed by the transcript filed as an Appendix. The jury is still sitting, waiting to hear argument and to be instructed. Respondent having concluded its evidence and before closing its case wants to renew its motion for a directed verdict because of its contention that the railroad was not negligent and that the Petitioners were contributorily negligent. There had been a long argument on these points at the close of Petitioners' case. (R. 115-127)

The Court, because of the previous motion, knew as did counsel for the Petitioners just what the Respondent was going to say. The Court interrupted counsel for the Respondent when the direction in which he was going was clear, informing Respondent in effect that the Court understood, that it understood why it was being made at the close of the evidence, but that the case was going to the jury. (Appendix I)

The Court then asked counsel about an instruction the Court was to give the jury on the mortality table. Its motion for a directed verdict overruled, the defense rested.

Then the Petitioners offered their so-called "rebuttal evidence". The evidence inquired into two things, neither material. One, whether a claim agent for the railroad knew of the injury the day it happened. This

evidence rebutted nothing, nor did it involve an issue in the lawsuit. Two, the evidence showed that Mrs. McFarlin complained of pain to the agent on the evening of the accident. This testimony rebutted nothing; nor did it serve any other purpose.

All of the medical testimony and all of the record as it related to pain and suffering was eliminated from the Respondent's record on appeal to the Tenth Circuit Court of Appeals under Rule 75(e), Rules of Civil Procedure, which requires that matters not essential to the appeal be eliminated from the record.[2]

Counsel will state, however, that the fact that Mrs. McFarlin suffered from her injuries was never put into issue.

Consequently, the evidence served no purpose. It was not material to any of the issues. Respondent made no objection because of its brevity and the fact that its presence in the record, though improper rebuttal, was harmless.

Thereafter, the Court immediately proceeded to its business with the jury and stated that the case was now ready for jury argument and the Court's instructions. (Appendix I)

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[2] Rule 75 (e)

Record to be abbreviated. All matter not essential to the decision of the questions presented by the appeal shall be omitted. Formal parts of all exhibits and more than one copy of any document shall be excluded. Documents shall be abridged by omitting all irrelevant and formal portions thereof. For any infraction of this rule or for unnecessary substitution by one party of evidence in question and answer form for a fair narrative statement proposed by another, the appellate court may withhold or impose costs as the circumstances of the case and discouragement of like conduct in the future may require; and costs may be imposed upon offending attorneys or parties.

Counsel for the Respondent, if he had assumed out of an abundance of caution that the Court should adjourn to chambers where it had been only moments before so that he could present the same motion he had just presented, would have been considered impertinent by the Court. The Court had just told Respondent that although Petitioners' case was weak, it would be given to the jury. (Appendix I) Nothing had changed, nothing materially had happened.

Petitioners are not asking for a fair and reasonable application of Rule 50; nor are they seeking to take advantage of a careless but substantial oversight on Respondent's part. Petitioners seek a windfall, where no harm was suffered and no surprise given them; nor was the Court misled.

SUMMATION

Respondent submits that no special or important reasons have been advanced by Petitioners in support of their application that would compel the Court to the conclusion that the writ should be granted in the exercise of its sound discretion.

Respondent respectfully moves the Court that Petitioners' application for writ of certiorari to the United States Court of Appeals, Tenth Circuit, be denied.

Respectfully submitted,

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APPENDIX I

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

No. 4934

Civil

CLAUDINE McFARLIN and LEONARD McFARLIN, *Plaintiffs*,

v.

CHICAGO, ROCK ISLAND & PACIFIC RAIROAD CO.,
a corporation, *Defendant*.

Partial Transcript of Proceedings

November 6 and 7, 1963

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BE IT REMEMBERED, that on the 4th, 5th, 6th, and 7th days of November, 1963, the above entitled and numbered cause came on for trial before the Honorable H. Vearle Payne, United States District Judge, and a jury at Albuquerque, New Mexico, and that proceedings were had, in part, on the 6th and 7th days of November as follows:

PARTIAL TRANSCRIPT OF PROCEEDINGS

(The following proceedings were had in the Court's chambers, outside the presence of the jury, counsel for the parties being present:)

Mr. Whorton: If it please the Court, the defendant at this time will renew its motion to dismiss the first cause of action, the defendant having closed its evidence, on the ground that the plaintiff was contributorily negligent as a matter of law.

I feel that the defendant's case as it has come forward has clearly demonstrated that the plaintiff used no care whatsoever in approaching this crossing, that she appeared to be totally preoccupied and, after leaving the mailboxes, simply drove upon the crossing and was struck. I realize there is a slight conflict in evidence there, but it is so small and insignificant, in defendant's mind, that we are moving for—

The Court: I will overrule the motion. You understand that I realize it is a weak situation, but I just feel some doubt in my own mind and feel that, feeling some doubt, I should submit it to the jury.

Can you agree on that mortality table so I can tell the jury?

Mr. Seller: 27.75.

(The conference in chambers was concluded and the following proceedings were had in the presence of the jury:)

The Court: Does the defense rest?

Mr. Seller: The defense rests.

The Court: You may read your stipulation into the record, Mr. Hart.

Mr. Hart: If the Court please, it is stipulated by and between counsel that the record may show the average morality of a person 43 years of age to be—that is, the average life expectancy remaining to be 27.75 years.

The Court: All right, the record will so show.
Mr. Seller: It is so stipulated.
The Court: You may call your rebuttal witnesses.
Mr. Hart: Mr. Clinger.

N. W. CLINGER

having previously been sworn, further testified as follows:

Direct Examination

By Mr. Hart:

Q. You are the same Mr. Clinger that previously testified, is that correct? A. Yes, sir.

Q. Mr. Clinger, did you go to the home of the McFarlins on the evening of July 12, 1960? A. Yes, sir.

Q. And did Mrs. McFarlin tell you at that time of any injury that she had received in the collision? A. I believe she complained of her neck, as I recall it.

Q. At that time? A. Yes, sir.

Mr. Hart: That is all, your Honor.

The Court: Any cross?

Mr. Seller: No cross, your Honor.

The Court: You may step down.

Mr. Hart: That is all the plaintiff's rebuttal, your Honor.

The Court: Now, ladies and gentlemen of the jury, this is all the evidence to be given in this case. The Court is going to have to prepare instructions to the jury, and, after they are prepared, we will then hear the arguments on each side and then I will read the instructions. I wondered, ladies and gentlemen, if I were to excuse the jury now or recess now so that counsel and the Court can work on the instructions this evening, if you would have any objection to starting work at eight o'clock in the morning. Would that bother any of you? I have other cases and I would like to get started so that I can get the other cases going. I think then that we will recess now and I will work on instructions and, Mr. Farlow, your case

won't start until I can hear the arguments of counsel and give the instructions in the morning, but we will start at eight so as to get to you as soon as we can. I would anticipate, in any event, we can get started with the next trial by ten and maybe a little before ten.

Now, ladies and gentlemen, I will repeat the cautions I previously made about discussing the case or reading about it, making up your minds about it until you have heard the arguments of counsel and the instructions of the Court. Subject to those admonitions, Court will stand in recess until eight o'clock in the morning.

(Whereupon, Court recessed at 3:45 p.m. on November 6, 1963, until 8:10 a.m. on November 7, 1963, at which time the following proceedings were had:

The Court: Gentlemen, do you want your arguments taken by the reporter or not?

Mr. Hart: I don't believe so, your Honor.

Mr. Seller: We won't request it, your Honor.

The Court: Let the record show that both sides have waived the taking of the argument.

(Whereupon, arguments were presented to the jury by Mr. Hart on behalf of the plaintiffs and by Mr. Seller on behalf of the defendant.)

The Court: Will counsel approach the bench just a moment, please.

(Discussion was had by the Court and counsel off the record at the bench.)

The Court: Ladies and gentlemen of the jury; it becomes my duty to instruct you as to the law.

UNITED STATES OF AMERICA

DISTRICT OF NEW MEXICO

I HEREBY CERTIFY that the foregoing and attached Partial Transcript of Proceedings is a true record of proceedings had in the above entitled and numbered cause at the time and place herein stated, as stenographically recorded by me.

DATED at Albuquerque, New Mexico, this 7th day of December, 1964.

s/ JUANITA GODDING
U. S. Court Reporter